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The treaty making power.

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THE TREATY-MAKING POWER.

SPEECH

OF

HON. SWAGAR SHERLEY,

OF KENTUCKY,

IN THE

HOUSE OF REPRESENTATIVES,

Tuesday, January 22, 1907.

WASHINGTON.
1907.

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SPEECH

OF

HON. SWAGAR SHERLEY.

The House being in Committee of the Whole House on the state of the Union and having under consideration the bill (H. R. 24538) making appropriations for the diplomatic and consular service for the fiscal year ending June 30, 1908—

Mr. SHERLEY said:

Mr. CHAIRMAN: There have recently been made in the House and in the Senate several interesting speeches on the extent of the treaty-making power conferred in the Constitution of the United States upon the President and the Senate. In this discussion, however, there has been omitted one rather striking fact that I desire to call to the attention of the committee before proceeding to the larger discussion of the extent of the treaty-making power. There is to-day no law upon the Federal statute books that enables the National Government to punish violations of treaty rights of aliens. I hold it to be a position not to be controverted that to the extent that there is responsibility there ought to be power; and inasmuch as the National Government can and does confer rights upon aliens, it follows that it should have the power to enforce recognition of those rights and to punish any efforts to disregard them. If at any time some citizen of a foreign country resident in America should be injured or his rights violated, the foreign country would look not to the particular State where the injury occurred, but to the National Government for a redress of the wrong. That has been the history in the past and it will be so in the future. When this country was confronted by a claim by Italy, growing out of the disturbances in the State of Louisiana, Italy declined to receive the suggestion of the National Government that that was a matter that should be taken up with the State of Louisiana, and while the National Government did disclaim responsibility, it nevertheless made payment in satisfaction of that claim. During the term of President Harrison in a message to Congress attention was called to this absence of Federal law.

He said:

It would, I believe, be entirely competent for Congress to make offenses against treaty rights of foreigners domiciled in the United States cognizable in the Federal courts. This has not, however, been done, and the Federal officers and courts have no power in such cases to intervene, either for the protection of the foreign citizen or for the punishment of its slayers.

President Roosevelt has also called attention to the need for this legislation, saying that—

One of the great embarrassments attending the performance of our international obligations is the fact that the statutes of the United States are entirely inadequate. They fail to give to the National Government sufficiently ample power, through the United States courts and by the use of the Army and Navy, to protect aliens in the rights secured to them under solemn treaties which are the law of the land.

So far as his message seems to call attention to the need of giving jurisdiction to the Federal courts I am entirely in accord with him. So far as he suggests the need of giving powers to the Army and Navy in the matter I disagree with him, believing that there can be given ample power to the Federal courts to control the situation, and I accordingly introduced in the early part of this session the following bill:

A bill (H. R. 20540) punishing conspiracy to injure or intimidate any person in the exercise of a right under the Constitution or laws of the United States.

Be it enacted, etc., That if two or more persons conspire to injure, oppress, threaten, or intimidate any person in the free exercise or enjoyment of any right secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, they shall be fined not more than $5,000, or imprisoned not more than ten years, or both.

That is an exact copy of section 5508 of the Revised Statutes, except that it changes the word "citizen" to the word "person." It was held by the Supreme Court, in the case of Baldwin *v.* Frank, reported in 120 U. S., 678, that the word "citizen" in that section did not embrace an alien and that an indictment brought under that section which charged certain men with a conspiracy to deprive Chinese aliens, resident in California, of the right of residence there could not be sustained, because the word "citizen" was used in the narrow sense of citizen of the United States or of the States and not in the broad sense of "person;" but the court said that, while there was no law covering such an offense, Congress had ample power to provide for the punishment of an offense against rights given by treaty to aliens. Now, it is manifest that this may become at any time a very serious matter. I do not believe that we need to apprehend at present any difficulties, but the fact that there has been much discussion relative to the rights under existing treaties of aliens residing in America and that there have been, in certain parts of the country, pronounced views relative to the matter, make it evident that there may arise at any time a situation where irresponsible men, disregarding the law and the obligations imposed upon us toward aliens residing in America, might commit some act of violence, might do something that would involve this nation in a very serious controversy with some foreign power. For this nation, then, to be put in the humiliating position of being held responsible by another power for a wrong done upon an alien residing in America and yet be unable to punish the perpetrators of that wrong would be a matter of grave concern to us all and place America in a pitiful position in the eyes of the world. I am not one of those who believe that the treaty-making power is unlimited, and I shall take occasion later on to state my views relative to that power, but I plant myself upon this firm proposition, that to the extent that we can confer a right upon an alien, to that extent the National Government that confers it ought to have the machinery by which it can punish any violation of that right, and I hope that very shortly this Congress will consider the advisability of passing this or similar legislation. The bill is purposely drawn in general terms, so as to leave to the proper department the power to determine what rights can be conferred by treaty. Under it any man indicted would have the right to raise the constitutional question of whether the right that he is alleged

to have conspired against is such a right as could be conferred by treaty, and it would thus enable the Supreme Court in any given case to determine how far the treaty power goes and what rights are conferred under any particular treaty, because I do not believe that there is anyone now who will seriously contend that the Federal courts have not the power to declare a treaty unconstitutional, the same as they might declare any law of Congress unconstitutional.

It is true that one of the most recent writers on the treaty-making powers, a gentleman who has gathered together much useful information and data concerning it, does doubt that power and bases the doubt upon the fact that Judge Chase, in rendering the decision in the case of Ware *v.* Hylton, said that if the court had the power it would not exercise it except in a clear case; and upon that flimsy ground he contends that the court itself has disposed of the idea that it would have such power, forgetful of the fact that that decision was rendered at a time when the Supreme Court had not determined its right to declare any law unconstitutional. And of course it is manifest that in regard to a treaty, as in regard to a law, even more so perhaps, the courts would be very slow to declare unconstitutional such a solemn compact. But that it has the unquestioned power no thinking man, acquainted with the theory of our Government, can long doubt.

And this brings me properly to a discussion of what rights can be conferred, because while I do not believe that the opinion gentlemen may have as to the extent of the power ought to in any wise influence their judgment relative to the proposition to give the National Government the power to enforce treaty rights, still it is probable that some, dreading the extreme power that is claimed under the treaty-making clause, would hesitate to give to the National Government the power to enforce offenses against such rights, because they think that even though the right may exist it ought not to be exercised.

In the House but a few days ago a very elaborate speech was made by my friend from Vermont [Mr. FOSTER] dealing with this whole question. I did not have the pleasure of hearing it, but I have read it with great care. It is full of learning, but it proceeds upon a theory of government to which I must give my most emphatic dissent. The gentleman in his remarks stated that he considered that the question of whether the treaty-making power rests in sovereignty or rests in grant is an immaterial question, or, as he puts it, an academic question. To my mind it is a fundamental question. Once admit that the treaty-making power exists not by virtue of the grant in the Constitution, but as an inherent part of the nationality of the United States Government, and you then admit that there is no limitation that can be put upon that power. If it is true the treaty-making power arises from the sovereignty of the nation, and if it be true that this nation has all powers that any nation can possess, then it must follow absolutely that the treaty-making power extends to every subject without regard to our division of powers among the States and the nation and among the different departments of the nation. It follows for this reason, because while the Constitution declares the power, the power is not born of the Constitution, but is born of a right inherent in national sovereignty.

Now, the fundamental mistake in that argument, as it is in many that proceed upon a similar theory, relative to power in the Federal Government not declared in the Constitution, is that the sovereignty of the American people rests in the National Government. The sovereignty of the American people rests neither in the national nor State governments nor in all together. It rests in the people, and only to the extent that they have given to the State and to the National Government a part of that sovereignty do those governments possess it. I can not state the case better than to quote a statement made by Justice Brewer in an address before the Virginia Bar Association, in which he says:

> I fully believe that this nation as a nation has all the powers which any nation possesses, but I as fully believe that those powers are vested in the people and that only such as they have enumerated in the Constitution have they granted to the Government.

And again, in delivering the opinion of the Supreme Court in the recent case of Hodges *v.* United States, reported in 203 United States Reports, he says:

> The National Government still remains one of enumerated powers, and the tenth amendment, which reads, "the powers not delegated to the United States are reserved to the States respectively or to the people," is not shorn of its vitality.

In very truth it may be said that upon these two statements hang all the law and the prophets. They represent to my mind the right theory of this Government. The National Government has only the powers delegated to it. Now, it is true that the treaty-making power is delegated in general terms; but it is not the only power delegated in general terms. It says "that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," and it also declares that "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land." In regard to treaties the phrase is used "under authority of the United States," and some have claimed that the words "under authority" give greater power than if the Constitution had said, as it does in regard to the laws, "in pursuance thereof." But the reason for using the phrase "under authority" is easy to be ascertained.

At the time of the adoption of the Constitution there were many treaties in effect. It was desired to validate all of these treaties and give them binding effect so far as they were in accord with the theory of the Government as set forth in the Constitution. If it had simply said "made under the Constitution" or "made in pursuance of the Constitution," it would have excluded treaties already in existence, and therefore there was used the phrase "under authority." It was not used in the sense of meaning that once you determine that the President and Senate had acted in making a compact with a foreign nation the question of its validity could not be raised. To assume that was to assume that the great fight in the Constitutional Convention had been waged in vain. They undertook to counterbalance the great States with the little ones. All the States were given equal representation in the Senate. They were given this as a safeguard against the fear that the great States would soon swallow them up. But as counteracting that there

was given to the House of Representatives, which has its representation based not upon the State but upon population, the exclusive right to raise revenue bills, and it was further declared that no appropriation of money shall be made except by authority of Congress. Now, if the treaty-making power was given supreme power, it, in its power, could assert both of these prerogatives, and then we would have the Executive and simply two-thirds of the Senate (who might represent a minority of the people, because even to-day there can be found two-thirds which represent much less than a majority of the people) able to enter into treaties with other nations, by which this vital right given to the House of Representatives, to hold the purse strings of the nation, would be abrogated and done away with.

Most students of the Constitution now agree that the treaty-making power is limited by this right in the House of Representatives, though some insist that when a treaty requires an appropriation of money Congress is morally bound to make the appropriation, but this House has ever maintained the right to freely decide for itself whether the appropriation should be made, and one has but to read the elaborate reports of the House Judiciary Committee, written by that great constitutional lawyer, Randolph Tucker (H. Repts. Nos. 2680–2721) to have all doubts removed. And it is also generally conceded that what is especially prohibited by the Constitution can not be done under the treaty-making power. It is manifest that no title of nobility could thus be conferred. It may also be considered as settled that where the right to do a given thing is given to Congress—as to coin money, regulate the militia, establish bankrupt laws—Congress alone can act, and the treaty-making power can not touch such subjects. But while these limitations are admitted by all save a few extremists, it is now being urged that the tenth amendment is in no sense a limitation upon the treaty-making power. The basis for this position I am unable to find. As said by Mr. Tucker, "The instant it is admitted that the power has limitations, even as to what is rightfully subject to it, the question at issue is narrowed to determining all these limits on principles of justice and of fair interpretation of the Constitution."

There is no reason that is good in logic that I know of that justifies you in taking part of the Constitution as superior and above the rest of the Constitution.

The very fact that the tenth amendment was adopted after the treaty-making power was conferred would indicate that it was intended that that power, along with all national powers, was to be exercised subject to the reservation stated in the tenth amendment. When this amendment was proposed the friends of the Constitution declared that it stated nothing that was not already the law, but those who were fearful of the power that was being given to the National Government said: "If that is true, it could do no harm, and we insist on an affirmative declaration; and inasmuch as you have got in the Constitution as already drawn many affirmative declarations of the rights of the people, we insist on this additional one; we insist that except to the extent power is expressly given it is reserved to the States and people, respectively."

Now, the treaty-making power is unquestionably a very exten-

sive one. It is unquestionably true that the very most pronounced evil in connection with the Confederacy as it existed, aside from its inability to tax, so necessary an attribute of a virile government, was its inability to enforce the treaties then made and existing with foreign nations. It is true that there was constant complaint on the part of the Federal Government that the States disregarded these treaty obligations, and it is true that some of the States claimed that, while the treaties might be morally binding upon them, they were not legally binding, and claimed the privilege to regard or disregard them, as they saw fit. That proposition was effectually denied when it was put into the Constitution that not only the laws, but the treaties, should be the supreme law of the land, anything in the constitutions or the laws of the States to the contrary notwithstanding. That clause determined that question, and only that question. It determined that a legal treaty—that is, a treaty which is not ultra vires; a treaty made within the power—is the supreme law of the land. Nobody can dispute that. Nobody now claims that it is not. But it is the supreme law of the land in no other sense than any law made by Congress that is within its constitutional limitations is the supreme law of the land. And the best proof of that fact is the fact that Congress can, by enactment, repeal a treaty. If a treaty possessed a power peculiar to itself, if the treaty rose superior to a law and was supreme in any other sense, then it would follow inevitably that, being superior to the lawmaking body, it could not be repealed by the lawmaking body, and only the power warranted in making the treaty would be warranted in annulling it. And yet the Supreme Court decided, in the Chinese-exclusion cases, that the acts passed by Congress, in so far as they were in conflict with the treaty then in existence with China, abrogated that treaty, the rule being that a treaty of later date abrogates a law in conflict with it and a law of later date abrogates the treaty.

Now, if the treaty has only the power and none other than the law, it becomes important to determine, as we have determined many questions relating to the power of legislation in Congress, what are the limitations upon it. This is not an easy task. It is easy in general terms to recite limitations, but it is exceedingly difficult to determine the exact line and say, "Thus far shalt thou go and no further." It is true that there has never been a treaty declared by the Supreme Court to be unconstitutional, although there have been very many reviewed by that Court, and it is true that some of the decisions of the Supreme Court as to one subject-matter would seem in their logic to carry the conclusion that the clause relative to the reserved rights of the States did not apply; because they have held that it is within the power of the treaty-making power to remove by treaty the alienage of a foreigner, so as to enable him to inherit and transmit real estate. I should have said, as an original proposition, that that was a matter that remained within the States. I should have said, as Mr. Bayard when Secretary of State said, that if the question was to arise anew, he doubted very much whether the Supreme Court would hold as it has held; but I am faced with the fact, I recognize that they have decided; and in Chirac *v.* Chirac, and in many other decisions by that court, they have held that a treaty which conferred upon an alien the right to inherit and dispose of real

estate overrode any State law or constitution. I realize that in the first great case of Ware *v.* Hylton, the Supreme Court held that where the State of Virginia had passed acts escheating the property of aliens who were British subjects, and had also undertaken to put impediments in the way of their right to recover debts, that the treaty overrode those acts of the legislature and the constitution of the State of Virginia; but I am unwilling to concede any more in that line than needs to be conceded. The proposition that is involved in the present case, growing out of the controversy between Japan and California, is that the treaty-making power is not only able to remove alienage so far as it relates to residence, and so far as it relates to inheritance and transmission of property, but that it can go to the extent of conferring upon an alien every right enjoyed by a citizen of the United States or of any particular State. That I deny. It is manifest that no treaty could undertake to confer upon an alien the right to hold office within a State. It is manifest that no treaty could confer upon an alien the right to the suffrage within a State; because, gentlemen, the treaty-making clause must always be held subject to the general purpose and scope of our Government, State and National. It is unthinkable that the makers of the Constitution, who were so careful to guard the powers of every particular department, to offer check against check, and counterbalance against counterbalance, were yet so impressed with the necessity of having facility of contract with foreign nations that they were willing to give to one man and two-thirds of the Senate present—not even two-thirds of all elected—the power to make a law that could override all State enactments and rule. The National Government could, if it saw fit, as it did see fit in the Chinese treaty, give to the citizens of a foreign country the right to education in the public schools of the National Government, because that is a matter that rests with the nation.

The burden is upon the nation in maintaining these schools, and it might be proper that the nation should impose the additional burden of education of aliens. But how can it be said, where the obligation is one that belongs to the State primarily, that is subject to the State's will, so subject that the State could to-morrow, if it saw fit, do away with its public-school system, make what appropriation it saw fit, or none at all, that the National Government could confer upon an alien such right? Once you concede that right, I see no reason in a logical way why you should not concede any other particular right that may be desired in regard to the internal affairs of a State.

Now, I desire to draw the attention of the committee to another argument, and I do it with a great deal of hesitancy and some reluctance. What I am about to say may seem foolish, and I confess it is novel. I am not satisfied in my own mind, but I am unable to detect the flaw in the logic if it be there. The Constitution provides that the President, with the consent of the Senate, may make treaties and also provides that "no State shall enter into any treaty, alliance, or confederation." Now, if this was all, it would be manifest that whatever agreement might be had with other nations would have to be had by virtue of a treaty made by the National Government. But this is not all. The prohibition upon the States to make treaties is contained in the beginning of section 10 of Article I of the Constitution, and

in the last division of that section it is declared that "no State shall, without the consent of Congress, * * * enter into an agreement or compact with another State, or with a foreign power." Of course it is clear that the negative form of this declaration admits the affirmative, and a State can with the consent of Congress enter into an agreement with another State or with a foreign power. But yesterday this House passed a bill giving the consent of Congress to an agreement between two of the States. Now, if an agreement can be made between a State and a foreign power, it follows that such an agreement must be one not included within the scope of a treaty, because a State is, as we have seen, prohibited from making any treaty.

That of itself is a further indication that the treaty-making power does not embrace all contracts of every kind which can be thought of between the people of one country and the people of another. What seems to my mind to have been the view of the makers of the Constitution was that the treaty power should relate to those subjects naturally belonging to treaties; should relate to those subjects that pertain to the country as a whole. It was proper—aye, it was necessary—that one voice should speak as to its contracts with other nations when it spoke on behalf of all the people, and it was further manifest that when that voice spoke within its domain, the voice of every State must be silent, that no discordant note might be heard to limit or deny the solemn compact of the General Government. But it is evident that there are many things that may pertain peculiarly to one locality, to one section of the country, and to its relationship to foreign nations that do not pertain to the balance of the country and should not be embraced within a treaty. We have States adjoining Canada, we have States adjoining Mexico, and it might be proper—and I do not know but what it has been done; I was unable to find any case—for one of those States, by consent of Congress, to enter into an agreement with a foreign nation relative to such matter local to it. I even consider that this very subject-matter that has given rise to this discussion is a case that would more properly fall into an agreement between a State and a foreign power than it would under the treaty-making power. It might well be that one State would be willing to concede to the citizens of a foreign country the right of education within the schools of that State in consideration of the same right, for instance, being given to the citizens of that State in the country with which the agreement is made, but that the National Government should have the power to confer upon a foreigner a right which imposes an obligation not upon the nation, but upon an individual State, seems to me utterly illogical. There is to my mind a distinction in an agreement removing a disability from one creating an affirmative right. The Supreme Court has said, and therefore I accept it, that the treaty-making power can confer the right, or, to put it more accurately, that it can remove the disability of alienage so that the foreigner may inherit what he would inherit if it were not for his alien birth. That is simply the removal of a disability and confers no burden upon the State; it simply declares an equity, does away with the old harsh view that the outsider, the barbarian, as the Greeks called all that lived outside of their borders, should have no right of property within a

state. Modern international law does not recognize such treatment. It says foreigners should be treated in their rights of property as if they did not have the disability of alienage. To hold, however, that our treaty-making power goes to the extent of giving an affirmative right that imposes an obligation not upon the United States, but upon a particular State; that requires the taxation not of all the people; seems to my mind to carry it very much too far. This I do know, that if that be the extent of the treaty-making power, the sooner the people of the United States demand of their representatives in the other branch of Congress a strict and careful limitation of the contracts that are entered into with foreign nations the better. I hold very much to the theory that the less of contact between nations and the more of contact between people the better. I believe that a treaty does not always help, but is very apt to hamper, the friendly relations between nations. Certainly if the construction that is being put by the Administration upon this particular treaty be the true one, and I shall not discuss that question, though it seems to me to be open to much question, then it follows that a right that was not considered by the parties at the time it was given, at least not considered to the extent of having an express declaration about it, is liable to be made the cause of disturbing relations that have existed harmoniously for more than half a century between the two countries. Such a result flowing from ill-considered treaties is to be greatly deplored, and the people of America should demand of the treaty-making power the most careful scrutiny of any treaty entered into.

Mr. Chairman, an examination of the decisions and the text writers on this subject will, I believe, confirm these views of mine. It so happens that the debates at the time of the adoption of the Constitution are singularly silent in regard to the matter, but when the Constitution came before the various State conventions for adoption there occurred considerable debate, particularly in Virginia. Patrick Henry, opposed to the Constitution, believing sincerely that it was robbing the States of all their rights and depriving the people of liberty, seized upon every possible thing as an argument against ratifying the Constitution. Among other things he took hold of the treaty-making power. He made then the very claim that is made by the advocates of an unlimited power now. He declared that the treaty-making power was sufficient to swallow up all the rights of the States and of the National Government; that all they needed to do was to enter into some agreement with a foreign country, and what they could not do by ordinary act of legislation they then became empowered to do. He was answered by Madison, Randolph, Nicholas, and several others of the members of the convention, and in answering him they declared that such reasoning was not warranted; that the treaty-making power was limited, must be considered as being subject to the express limitations in the Constitution, and further limited by the nature and character of our dual form of government. The gentleman from Vermont [Mr. FOSTER] quoted Calhoun as authority for his position. Some seem to think that because Calhoun enumerates certain limitations, therefore all other limitations not enumerated do not apply. This does not follow; because he does, in the enumeration of specific cases, also put as a limi-

tation the nature and the character of our Government, and the Supreme Court, when quoting Calhoun in the case of Geoffroy *v.* Riggs (133 U. S., 258), a case growing out of the treaty made with France, where the court again confirmed the power of a treaty to give an alien the right to inherit and transmit property, said that the treaty-making power was not only limited by these express provisions, but limited "by the nature of the Government itself and of that of the States." If it be limited by the character of the government of the States, what conclusion can you draw other than that the reserved powers of the States are a limitation upon the treaty-making power? For if it does not mean that, it means nothing.

I might continue to cite cases and writers, and I had originally intended so to do, but within a few days a gentleman of my city, a distinguished lawyer, the judge of our chancery court, and a professor in our law school, has delivered an elaborate lecture upon this subject. He has summarized so well all of the opinions of the writers, from the adoption of the Constitution down, that for me to undertake it would be either to repeat what he has said or to poorly do what has been superbly done. So I shall content myself with filing as a part of my remarks, with the permission of the committee, this elaborate lecture upon that question, and I trust the House will read it most carefully. I have spoken without manuscript, save a few notes, and of necessity have not therefore been always accurate or concise, but there will be found the exact quotations from the men who made the Constitution and from the great writers and judges who have construed it ever since. In conclusion, may I be pardoned for saying that it seems to me that in this day, when we are told that if the exigencies of the case demand it we must either give to the National Government more power or the National Government must in some way take it to itself, the House should view with particular care the claim that is being made that this power extends over all others. I utterly abhor the man who is so narrow, whose love of his State is so petty, that he can not rise to a realization of the obligations and duties imposed upon all of us as members of the nation, but I abhor in even greater degree the man who, out of pressure of the immediate moment, out of the exigencies of the case, is willing to twist and pervert the fundamental law of the land in order to have his way and in order to give the National Government unwarranted power. [Applause.] I believe more and more each day that the salvation of America and of America's people lies in getting back to the old doctrine of self-dependence and independence [applause], of teaching the people that not by statute can they be made upright, but out of themselves must come the grace that is to reform and redeem. I believe we must have the people check the constant tendency to put off somewhere else the doing of an obligation that rests at home. It has been my fortune in this House to frequently oppose the power of the National Government. Sometimes it may have seemed that in doing so I would wish to take away from it all of its real strength, but this is in no sense true. If I had been a member of a State legislature I should most likely have been just as pronounced in my opposition to much of the legislation there. I believe that the States should only do those things that the individual can not do, and that the nation should only do those

things that the State and the individual can not do, and I always approach every proposition of legislation with a feeling of hostility. The burden is also on the man proposing legislation when he asks me to support it.

I think we are a law-ridden Government. We have so much law that we have ceased to obey any law. Why, it has gotten to the point where our very notices give an indication of our disregard of the law. We publish not only that a thing is prohibited, but in order to make somebody really believe that we mean it we say that such and such a thing is positively prohibited. as if there could be degrees of prohibition in a law-abiding community. And it all grows out of the fact that we pass laws that result in bringing about a condition that, being obeyed, would not be livable under. It is one of the great eternal truths of life that the remote results of legislation are always greater, more far-reaching in their effect upon people, than the immediate results. We pass some act for a particular purpose, and after we have passed it for that purpose we awake to find that the effect of it is being felt in a hundred other directions that were never contemplated, and we are forced either to disregard the law or to repeal it, and then the inertia of Government in regard to the repealing of laws makes us disregard them, and we become a nation of lawbreakers.

Therefore I believe that one performs no higher duty than when he insists on the strict construction of powers; not with the idea of detracting from the vigor of the nation, but because he believes, as said by Justice Brewer, that this nation as a nation has all the powers that any people have, but that those powers rest with the people, and only to the extent that they have delegated them do they rest in the National Government, and that we have made provision for the extension of those powers; and because it would be better to wait until that extension was legally given and suffer the particular evil that exists than to disregard the highest law of the land.

Gentlemen, if you permit the disregard of your Constitution, how, in the name of common sense, can you expect the people to regard the law supposedly made under the Constitution? [Loud applause.]

APPENDIX.

In accordance with the permission granted me by the committee, I append the lecture delivered by Judge Shackleford Miller, of Louisville, Ky., before the Jefferson School of Law:

The recent disturbance in California, brought about by the action of the school authorities of San Francisco in closing the doors of the public schools of that city against Japanese students residing there, naturally provokes a discussion of the treaty-making power under the Constitution of the United States. The Japanese claim the right to attend the San Francisco public schools under the treaty of 1894 between Japan and the United States, which provides as follows:

"The citizens or subjects of either of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons or property. In whatever relates to rights of residence and travel, to the possession of goods and effects of any kind, to the succession to personal estate by will or otherwise and the disposal of property of any kind and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects of the most-favored nation."

It will no doubt readily be conceded that the right of the Japanese students to attend the public schools must be founded upon this treaty right of residence or it does not exist. There is no other right or privilege mentioned in the treaty which could even be remotely claimed to embrace the right of attending the public schools. It would seem, however, that a fair construction of the treaty would scarcely extend the privilege of the public schools of a State to unnaturalized foreigners. If the Federal Government had so intended, it is but reasonable to assume that the treaty would have so provided in express terms. It was careful to cover the rights of entry, travel, residence, the succession of personalty, and the disposition of property of all kinds, but it nowhere appears that school privileges were ever considered.

Under the present treaty, therefore, it would seem reasonably clear that the Japanese residents of California have no right to have themselves and their children educated at the public schools and at the public expense.

But the larger question arises: Can the President and Senate constitutionally make a treaty with Japan that would confer this right upon the Japanese residents of California?

The answer to this question turns upon the extent of the treaty-making power granted to the Federal Government under the Federal Constitution.

This power is found in the following provision:

"He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senate present concur." (Const., Art. II, sec. 2, cl. 2.)

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all the treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." (Ib., Art. VI, cl. 2.)

It may be interesting to consider briefly the origin of the clause and how it has been viewed in the light of American history.

NOT DISCUSSED IN CONVENTION.

Strange though it may now appear, the question of the extent of the treaty-making power was not discussed at all in the Federal convention of 1787. The right to enter into "treaties and alliances," under some slight restrictions upon treaties relating to commerce, was given to the Congress under the Articles of Confederation (art. 9). The clause relating to the subject of treaties originated in the "committee of detail" and in the later stages of the convention. Prior to that time the subject had not come up for action, but had only been referred to incidentally in the consideration and discussion of other subjects. It first formally appeared as the first clause of article 9 in the committee's report of August 6, 1787, wherein "the power to make treaties" was lodged in the Senate alone. (5 Elliott's Debates, 379.) After a short consideration on August 23, the clause was referred back to the "committee of detail;" but as that committee made no further report, the clause went to the "committee on unfinished portions," which reported it on September 4 substantially as we now have it, by transferring the power to the President, with the advice and consent of the Senate.

At no time, however, did the convention discuss the scope or extent of the power; it merely considered the question as to where the power should be lodged—who should exercise it. The same is true as to the "Federalist," written in support of the proposed constitution while it was before the State convention for ratification. The authors of that able work confined their discussion of the subject of the treaty-making power not to its extent, but to an effort tending to show that it had been properly lodged in the President and Senate. (Nos. 64 and 75.)

But when the Constitution came on for ratification by the State conventions it was to be expected that its opponents would carefully scan it with the view of determining, if possible, precisely what powers the several provisions carried and what limitations they imposed.

The scope and extent of the provisions of the Constitution were more elaborately discussed in the Virginia ratifying convention of 1788 than in any of the other similar conventions.

In the Virginia ratification of 1788 it was strongly contended by Patrick Henry, William Grayson, George Mason, and the other leading opponents of the Constitution that the treaty-making power was unlimited and therefore unwise and inconsistent with the proclaimed theory of its friends that the proposed Federal Government was one of delegated powers, specifically defined or necessarily implied. In the course of the debate Mr. Henry said:

"We are so used to speak of enormity of powers that we are familiar with it. To me this power appears still destructive, for they can make any treaty.

"If Congress forbears to exercise it, you may thank them, but they may exercise it if they please and as they please. They have a right from the paramount power given them to do so."

It fell to the lot of Madison, Governor Randolph, and George Nicholas to meet this argument, and in doing so Nicholas said:

NOT REPUGNANT TO CONSTITUTION.

"The worthy Member says that they can make a treaty relinquishing any rights and inflicting punishments, because all the treaties are declared paramount to the constitutions and laws of the States. An attentive consideration of this will show the committee that they can do no such thing. The provision of the sixth article is that this Constitution and the laws of the United States which shall be made under the authority of the United States shall be the supreme law of the land. They can by this make no treaty which shall be repugnant to the spirit of the Constitution or inconsistent with the delegated powers. The treaties they make must be made under the authority of the United States to be within their province. It is sufficiently secured because it only declares that in pursuance of the power given they shall be the supreme law of the land, notwithstanding anything in the constitution or laws of the particular States." (3 Elliott's Debates, 507.)

In closing the debate Mr. Madison said:

"I am persuaded that when this power comes to be thoroughly and candidly viewed it will be found right and proper. As to its extent, perhaps it will be satisfactory to the committee that the power is precisely in the new Constitution as it is in the Confederation. In the existing confederacy Congress is authorized indefinitely to make treaties. Many of the States have recognized the treaties of Congress to be the supreme law of the land. Acts have passed within a year declaring this to be the case. I have seen many of them. Does it follow because the power is given to Congress that it is absolute and unlimited? I do not conceive that power is given to the President and Senate to dismember the empire or to alienate any great essential right. I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation. One objection against the amendment proposed is this, that by implication it would give power to the legislative authority to dismember the empire—a power that ought not to be given but by the necessity that would force assent from every man. I think it rests on the safest foundations as it is. The object of treaties is the regulation of intercourse with foreign nations and is external. I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might and probably would be defective. They might be restrained by such a definition from exercising the authority where it could be essential to the interest and safety of the community. It is most safe therefore to leave it to be exercised as contingencies may arise." (3 Elliott's Debates, 514.)

The views of Madison prevailed in the Virginia convention, as they have generally prevailed upon constitutional questions in the country at large. (Pomeroy's Constitutional Law, sec. 34.)

FIRST IMPORTANT DISCUSSION.

The Constitution went into operation in 1789. The first important discussion of the treaty-making power arose in connection with Jay's treaty concluded with Great Britain on November 19, 1794. It was approved by the Senate on August 18, 1795; proclaimed by the President on February 29, 1796, and this proclamation was communicated to both Houses of Congress on March 1, 1796. Money was necessary to carry its provisions into effect, and as money could be only appropriated by both Houses of Congress, differences of opinion at once arose as to the extent of the treaty-making power and the obligation it imposed upon the House of Representatives:

"On the one side it was maintained that the power of the President and Senate as to treaties was absolute, and that the House of Representatives was bound, under the Constitution, to make the appropriations necessary to carry the treaty into effect. On the other side it was contended that, under the Constitution, the consent of the House was requisite to pass appropriations to carry the treaty into effect, and that this was as much known to the other contracting party as was

the consent of the Senate to the preliminary adoption of the treaty." (Wharton's Int. Law Dig., 17.)

On March 21, 1796, Jefferson wrote to Monroe, then in France, as follows:

"The British treaty has been formally at length laid before Congress. All America is a tiptoe to see what the House of Representatives will decide on it.

"We conceive the constitutional doctrine to be that, though the President and Senate have the general power of making treaties, yet wherever they include in a treaty matters confided by the Constitution to the three branches of legislature, an act of legislation will be requisite to confirm these articles, and that the House of Representatives, as one branch of the legislature, are perfectly free to pass the act or to refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the treaty go into effect or not. On the precedent now to be set will depend the future construction of our Constitution, and whether the powers of legislation shall be transferred from the President, Senate, and House of Representatives to the President, Senate, and Piaminigo, or any other Indian, Algerine, or other chief." (4 Jefferson's Works, 134.)

Henry Adams, a grandson of that stout old Federalist, John Quincy Adams, has written a life of Albert Gallatin, who was then a Member of Congress from Pennsylvania. In describing the debate in the House of Representatives, Henry Adams says:

CHECK ON TREATY-MAKING POWER.

"The debate began on March 7, 1796, and on the 10th Mr. Gallatin spoke attacking the constitutional doctrine of the Federalists and laying down his own. He claimed for the House, not a power to make treaties, but a check upon the treaty-making power when clashing with the special powers expressly vested in Congress by the Constitution; he showed the existence of this check in the British constitution, and he showed its necessity in our own, for if the treaty-making power is not limited by existing laws, or if it repeals the laws that clash with, or if the legislature is obliged to repeal the laws so clashing, then the legislative power in fact resides in the President and Senate, and they can, by employing an Indian tribe, pass any law under the color of treaty.

"The argument was irresistible; it was never answered; and, indeed, the mere statement is enough to leave only a sense of surprise that the Federalists should have hazarded themselves on such preposterous ground. Some years later, when the purchase of Alaska brought this subject again before the House on the question of appropriating the purchase money stipulated by the treaty, the Administration abandoned the old Federalist position; the right of the House to call for papers, to deliberate on the merits of the treaty, even to refuse appropriations if the treaty was inconsistent with the Constitution or with the established policy of the country, was fully conceded. The Administration only made the reasonable claim that if, upon just consideration, a treaty was found to be clearly within the constitutional powers of the Government, and consistent with the national policy, then it was the duty of each coordinate branch of the Government to shape its action accordingly. See the speech of N. P. Banks of June 30, 1868, Cong. Globe, vol. 75, appendix, p. 385."—(Life of Albert Gallatin, p. 161.)

Gallatin's views prevailed in the House by a vote of 57 against 35.

While Jefferson was Vice-President he prepared his now famous Manual of Parliamentary Practice. It has ever since remained the highest authority in this country upon that subject. The work was published in 1800, and contains this note under the head of treaties:

"By the Constitution of the United States this department of legislation is confined to two branches only of the ordinary legislature; the President originating and the Senate having a negative. To what subject this power extends has not been defined in detail by the Constitution, nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract, or it would be a mere nullity, res inter alios acta. (2) By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and can not be otherwise regulated. (3) It must have meant to except out of these the rights reserved to the States, for surely the President and Senate can not do by treaty what the whole Government is interdicted from doing in any way. (4) And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others."

REASON FOR RESTRAINT.

"The Constitution thought it wise to restrain the Executive and Senate from entangling and embroiling our affairs with those of Europe. Besides, as the negotiations are carried on by the Executive alone, the subjecting to the ratification of the Representatives such articles as are within their participation is no more inconvenient than to the Senate. But the ground of this exemption is denied as unfounded. For example, e. g., the treaty of commerce with France, and it will be found that out of thirty-one articles there are not more than small portions of two or three of them which would not still remain as subjects of treaties, untouched by these exceptions." (Jefferson's Works, IX, 80.)

The first formal treatise upon the Constitution of the United States was published by Judge St. George Tucker in 1803 as an appendix to his edition of Blackstone. In that work Judge Tucker says:

"Treaties, as defined by Puffendorf, are certain agreements made by sovereigns between one another, of great use both in war and peace. Of these there are two kinds: The one such as reenforce the observance of what by the law of nature we were before obliged to, as the mutual exercise of civility and humanity, or the prevention of injuries on either side; the second, such as add some new engagement to the duties of natural law, or at least determine what was before too general and indefinite in the same, to something particular and precise. Of those which add some new engagements to those duties which natural law imposes upon all nations, the most usual relate to, or in their operation may affect, the sovereignty of the state, the unity of its parts, its territory or other property, its commerce with foreign nations, and vice versa; the mutual privileges and immunities of the citizens or subjects of the contracting powers, or the mutual aid of the contracting nations, in the case of an attack or hostility from any other quarter. To all these objects, if there be nothing in the fundamental laws of the state which contradicts it, the power of making treaties extends and is vested in the conductors of states, according to the opinion of Vattel.

"In our Constitution there is no restriction as to the subjects of treaties, unless perhaps the guaranty of a republican form of government and protection from invasion, contained in the fourth article, may be construed to impose such a restriction in behalf of the several States against the dismemberment of the Federal Republic. But whether this restriction may extend to prevent the alienation, by cession, of the western territory, not being a part of any State, may be somewhat more doubtful." (1 Tucker's Blackstone; appendix, 332.)

During the years 1790 and 1791 Mr. Justice Wilson, of the United States Supreme Court, delivered a course of lectures on law before the College of Philadelphia. These lectures were published in 1804, after his death, by his son. Part II of that work relates to the constitutions of the United States and of Pennsylvania, and chapter 2 thereof treats of the executive department. Justice Wilson dismisses the treaty-making power with the following scant consideration:

MUST BE KEPT DISTINCT.

"The President has power to nominate and, with the advice and consent of the Senate, to appoint ambassadors, judges of the Supreme Court, and, in general, all the other officers of the United States. On this subject there is a very striking and important difference between the Constitution of the United States and that of Pennsylvania. By the latter the first executive magistrate possesses, uncontrolled by either branch of the legislature, the power of appointing all officers whose appointments are not, in the constitution itself, otherwise provided for. On a former occasion I noticed a maxim which is of much consequence in the science of government—that the legislative and executive powers be preserved distinct and unmingled in their exercise. This maxim I then considered in a variety of views, and in each found it to be both true and useful. I am very free to confess that with regard to this point the proper principle of government is, in my opinion, observed by the constitution of Pennsylvania much more correctly than it is by the Constitution of the United States. In justice, however, to the latter, it might be remarked that, though the appointment of officers is to be the concurrent act of the President and Senate, yet an indispensable prerequisite—the nomination of them—is vested exclusively in the President.

"The observations which I have delivered concerning the appointment of officers apply likewise to treaties, the making of which is another power that the President has with the advice and consent of the Senate."—(2 Wilson's Works, 191.)

It seems strange that this total failure to discuss either the nature or extent of the treaty-making power in a formal set of lectures which

covered the whole field of the Constitution, could be the omission of one who was a distinguished member of the Federal Convention of 1787, and a justice of the Supreme Court of the United States in 1796, when that court decided the important case of Ware *v.* Hylton, reported in Third Dallas. In fact Justice Wilson delivered a short concurring opinion in that case. Nevertheless, he ignores a great constitutional question that had been ably debated in Congress when Jay's treaty was under fire, and in the Supreme Court by John Marshall, and before Justice Wilson himself.

In 1821 Mr. Wert, Attorney-General, gave an official opinion, in which he said:

"The people seem to have contemplated the National Government as the sole organ of intercourse with foreign nations. It ought to be armed with power to satisfy the fulfillment of all moral obligations, perfect and imperfect, which the law of nations devolves upon us as a nation. In this respect our system seems to be crippled and imperfect."—(1 Opins. Attys. Genl., 392.)

In 1825 William Rawle, a distinguished lawyer of Philadelphia, published A View of the Constitution of the United States. Mr. Rawle had been United States district attorney for Pennsylvania under Washington, and had been offered by him the Attorney-Generalship of the United States. He was a firm supporter of the Administration of John Adams. In discussing the treaty-making power, Mr. Rawle says:

MUST BE SOUGHT FOR IN PRINCIPLE.

"The most general terms are used in the Constitution. The powers of Congress in respect to making laws we shall find are laid under several restrictions. There are none in respect to treaties. * * * To define them in the Constitution would have been impossible, and therefore a general term could alone be made use of, which is, however, to be scrupulously confined to its legitimate interpretation. Whatever is wanting in an authority expressed must be sought for in principle, and to ascertain whether the execution of the treaty-making power can be supported we must carefully apply to it the principles of the Constitution from which alone the power proceeds. * * *

"There is a variance in the words descriptive of laws and those of treaties. In the former it is said those which shall be made in pursuance of the Constitution, but treaties are described as having been made, or which shall be made, under the authority of the United States.

"The explanation is that at the time of adopting the Constitution certain treaties existed, which had been made by Congress under the Confederation, the continuing obligations of which it was proper to declare. The words 'under the authority of the United States' were considered as extending equally to those previously made and to those which should subsequently be effected. But, although the former could not to be considered as made pursuant to a constitution which was not then in existence, the latter would not be 'under the authority of the United States' unless they are conformable to its Constitution" (p. 66).

In 1833 Judge Story published his "Commentaries upon the Constitution of the United States," in which he says:

"The power to make treaties is by the Constitution general, and it, of course, embraces all sorts of treaties, for peace or war, for commerce or territory, for alliances or success, for indemnity for injuries or payment of debts, for the recognition and enforcement of principles of public law, and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other. But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution can not be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination of it and can not supersede or interfere with any other of its fundamental provisions. Each is equally obligatory and of paramount authority within its scope, and no one embraces a right to annihilate any other. A treaty to change the organization of the Government or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers would be void, because it would destroy what it was designed merely to fulfill—the will of the people. Whether there are any other restrictions necessarily growing out of the structure of the Government will remain to be considered whenever the exigency shall arise." (Sec. 1508.)

Judge William Alexander Duer, of New York, delivered a course of lectures on the constitutional jurisprudence of the United States at Columbia College for many years. In 1833 he published the substance

of his lectures under the title of "Outlines of Lectures," etc.; and in 1843 he published a revised and enlarged work on the same subject entitled "Lectures on the Constitutional Jurisprudence of the United States." In this last and most complete statement of his views Judge Duer said:

CAN'T DESTROY OTHER POWERS.

"More general and extensive terms, also, are used in vesting the power with respect to treaties than in conferring that relative to laws; and, while the latter is laid under several restrictions, there are none imposed on the exercise of the former, notwithstanding it is committed to the President and Senate, in exclusion of the House of Representatives, and is executed through the instrumentality of agents delegated for that purpose. And, although the President and Senate are thus invested with this high and exclusive control over all those subjects of negotiation with foreign powers, which in their consequences may affect important domestic interests, yet it would have been impossible to have defined a power of this nature, and, therefore, general terms only were used. These general expressions, however, ought strictly to be confined to their legitimate signification; and, in order to ascertain whether the execution of the treaty-making power can be supported in any given case, those principles of the Constitution, from which the power proceeds, should carefully be applied to it. The power must, indeed, be construed in subordination to the Constitution; and, however in its operation it may qualify, it can not supersede or interfere with any other of its fundamental provisions, nor can it ever be so interpreted as to destroy other powers granted by that instrument." (2d ed., 228.)

Probably the best attempt at formulating a general rule for the exercise of the treaty-making power is that framed by Mr. Calhoun, in 1851, in his "Discourse on the Constitution and Government of the United States." It reads as follows:

"Although the treaty-making power is exclusively vested, and without enumeration or specification, in the Government of the United States, it is nevertheless subject to several important limitations. It is, in the first place, strictly limited to questions inter alios; that is, to questions between us and foreign powers which require negotiation to adjust them. All such clearly appertain to it. But to extend it beyond these, be the pretext what it may, would be to extend it beyond its allotted sphere, and thus a palpable violation of the Constitution. It is, in the next place, limited by all the provisions of the Constitution which inhibit certain acts from being done by the Government or any of its departments, of which description there are many. It is also limited by such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary, of which a striking example is to be found in that which declares that 'no money shall be drawn from the Treasury but in consequence of appropriations to be made by law.' This not only imposes an important restriction on the power, but gives to Congress, as the law-making power, and to the House of Representatives as a portion of Congress, the right to withhold appropriations; and thereby, one important control over the treaty-making power, whenever money is required to carry a treaty into effect, which is usually the case, especially in reference to those of much importance.

MORE IMPORTANT LIMITATION.

There still remains another and more important limitation, but of a more general and indefinite character. It can enter into no stipulation calculated to change the character of the Government, or to do that which can only be done by the Constitution-making power, or which is inconsistent with the nature and structure of the Government, or the objects for which it was formed. Among which it seems to be settled that it can not change or alter the boundary of a State or cede any portion of its territory without its consent. Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the limits of the treaty-making power and may be adjusted by it. (Calhoun's Works, I, 203.)

This definition was used in Hauenstein *v.* Lynham, 100 United States, 483, and in People *v.* Gerke, 5 California, 381.

Perhaps the ablest and most accurate law writer of the past fifty years was Judge Thomas M. Cooley, of Michigan. He always undertook to state the law as it had been settled by the decisions of the courts. Writing in 1880, he reached this conclusion:

"The President has power, by and with the consent of the Senate, to make treaties, provided two-thirds of the Senators concur. The Constitution imposes no restriction upon this power, but it is subject to the implied restriction that nothing can be done under it which changes the

Constitution of the country or robs a Department of the Government or any of the States of its constitutional authority." (Constitutional Law, 3d ed., p. 117.)

A more extended discussion of this subject is found in the late work of John Randolph Tucker on "The Constitution of the United States," published in 1899. After stating the question to be "Whether the exclusive power of treaty making, vested in the President and Senate, is unlimited in its operation upon all the objects for which a treaty may provide," he gives the respective contentions with respect to the power; quotes Vattel's saying that "it is from the fundamental laws of each state that we must learn where resides the authority that is capable of contracting with validity in the name of a state," and concludes as follows:

"A treaty therefore can not take away essential liberties secured by the constitution to the people. A treaty can not by the United States do what their Constitution forbids them to do. We suggest a further limitation: A treaty can not compel any Department of the Government to do what the Constitution submits to its exclusive and absolute will. On these questions the true canon of construction, that the treaty-making power in its seeming absoluteness and unconditional extent, is confronted with equally absolute and unconditional authority vested in the judiciary." (Vol. 2, p. 725.)

That a treaty can not invade the constitutional prerogatives of the legislature is well illustrated by Dr. Ernest Meier, a German author, who, according to Mr. Wharton, has given to the subject a degree of elaborate and extended exposition which it has received from no writer in our own tongue.

Doctor Meier was a professor of jurisprudence in the University of Halle, and gave his conclusions as follows:

POWER NOT ABSOLUTE.

"Congress has, under the Constitution, the right to lay taxes and imposts as well as to regulate foreign trade; but the President and the Senate, if the treaty-making power be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution Congress has the right to determine questions of naturalization, of patents, and of copyright. But, according to the view here contested, the President and Senate, by a treaty could on these important questions utterly destroy the legislative capacity of the House of Representatives. The Constitution gives Congress the right of declaring war. This right would be illusory if the President and Senate could by a treaty launch the country into a foreign war. The power of borrowing money on the credit of the United States resides in Congress; this power would cease to exist if the President and Senate could by treaty bind the country to the borrowing of foreign funds. By the Constitution 'no money shall be drawn from the Treasury but in consequence of appropriations made by the law;' but this limitation would cease to exist if by a treaty the United States could be bound to pay money to a foreign power. * * * Congress would cease to be the law-making power as is prescribed by the Constitution. The law-making power would be the President and the Senate. Such a condition would become the more dangerous from the fact that treaties so adopted, being on this particular hypothesis superior to legislation, would continue in force until superseded by other treaties. Not only, therefore, would a Congress consisting of two houses be made to give way to an oligarchy of President and Senate, but the decrees of this oligarchy when once made could only be changed by concurrence of President and of senatorial majority of two-thirds."—(Ueber den Abschluss von Staats vertragen.)

As a conclusion to this résumé of the views of authors and publicists upon this subject the following review by Prof. von Holst, the well-known German-American historian, is both pertinent and instructive:

CAN NOT BE UNLIMITED.

"As to the extent of the treaty power the Constitution says nothing, but it evidently can not be unlimited. The power exists only under the Constitution, and every treaty stipulation inconsistent with a provision of the constitutional law is ipsi facto null and void. Simple and self-evident as this principle is in theory, yet it may be very difficult under certain circumstances to decide whether or not it has been transgressed in fact. Indeed, the chief difficulty arises from the question of the relation of the treaty power of the President with the concurrence power of the Senate bears to the legislative power of Congress. The question is answered by saying that these powers must

be coordinate, for treaties, like laws, are 'sovereign acts,' which differ from laws only in form and in the organs by which the sovereign will expresses itself. It follows from this principle that a law can be repealed by a treaty (Foster *v.* Neilson, 2 Peters, 253) as well as a treaty by a law (The Cherokee Tobacco, 11 Wallace, 616). If a treaty and a law are in opposition, their respective dates must decide whether the one or the other is to be regarded as repealed (Foster *v.* Neilson, 2 Peters, 253, 314; Doe *v.* Braden, 16 Howard, 635). * * * Neither the principle nor the correctness of these conclusions from it can well be disputed, and they are, at any rate, valid constitutional law. But in spite of this, it must be admitted that the doctrine has its doubtful side both in theory and practice. It must be called at least an anomaly that, by the ex parte action of the President and two-thirds of the Senators present (who may be only a minority of the whole Senate), a law can be repealed the passage of which required the concurrence of the House of Representatives with the Senate and President, or a two-thirds majority of each House of Congress. The repeal of a treaty by the enactment of a law may, however, lead the more easily to serious consequences, because the incompatibility of the law and of the treaty may not be so clearly manifest that the foreign power concerned will immediately take notice of the law. It is in nowise inconceivable that Congress itself might know nothing of what it had done, so that only after a long time would the fact be established by judicial decision that in this direct manner a treaty was overthrown, the repeal of which had not been contemplated by either of the two contracting parties.

"On still another side of this question of the direct relation between the treaty power and the legislative power makes it difficult to fix the limits of the treaty power. It is certain that no authority granted by the Constitution to any of the factors of government can be drawn from it by treaty, for that would be a change of the Constitution, and, as such, unconstitutional. But Congress may be bound by a treaty not to exercise in a certain way a power belonging to it, although it might exercise it in that way if not bound by the treaty. The freedom of action of the House of Representatives can thus easily be restricted by a treaty to such a degree that the restriction must be admitted to be a violation of the constitution, even if not strictly of its letter, yet still of its spirit. Thus, for instance, the framers of the Constitution certainly did not wish that duties should be fixed in a way repugnant to the views of the House of Representatives, and yet this might be brought about at any moment by a commercial treaty. Of course, it must not be inferred that, in general, there should be no commercial treaties. But Daniel Webster was certainly right in advising his countrymen to consider carefully before beginning to handle questions of duties in connection with treaties." (Constitutional law of the United States, 202.)

CONFINED BY DECISIONS OF COURTS.

The text of a sound treatise on any subject of law is based upon and confined by the decisions of the courts upon that subject. I have followed this historical treatment of the treaty-making power from the Constitutional Convention of 1787 to the present time, purposely quoting any direct mention of the decisions in order that we might see what effect those decisions had from time to time upon the definitions and descriptions of the power as given by subsequent writers. The result is interesting and peculiar. In 1802 Tucker, the first author, cited no authority except the text of the Constitution; thirty years later Story cited Tucker, Rawle, and Jefferson, while in 1880 Cooley cites Tucker and Story, as herein quoted, in support of his text. The reason for this is plain, since the judicial decisions have been only so many applications of general rule to specific states of fact. For it is readily seen that while many of the decisions contain broad general statements to the effect that treaties are the supreme law of the land, there is always the accompanying qualification that it must be a constitutional treaty in order to be so considered.

It is clear that there may be an unconstitutional treaty, just as there may be an unconstitutional act of Congress. This point is well illustrated by the treaty negotiated in 1854 at Caracas by the United States minister and the Venezuelan Government, which provided, in its twenty-fifth article, that in case a citizen of either country should accept a commission in the service of an enemy at war with the other country he should be deemed a pirate and so punished. Mr. Marcy, Secretary of State, promptly repudiated the treaty, which was satisfactory in other respects, upon the ground that the Constitution provided that Congress should define the crime of piracy and its punishment, and that it could not be made the subject of a treaty. If the treaty had been ratified, there can be no doubt that the courts would have sustained Mr. Marcy's view.

Cooley recognizes the right of the House of Representatives to annul such a treaty in the following express terms:

"An unconstitutional or manifestly unwise treaty, the House of Representatives may possibly refuse to aid; and this, when legislation is needful, would be equivalent to a refusal of the Government, through one of its branches, to carry the treaty into effect. This would be an extreme measure, but it is conceivable that a case might arise in which a resort to it would be justifiable." (Constitutional Law, 3d ed., 175.)

Some of the opinions go further and expressly declare that treaties, like laws, are bound by the provisions of the Constitution. Thus, in 1847, in the License Cases (5 How., 613), Mr. Justice Daniel said:

"By the sixth article and second clause of the Constitution it is thus declared: 'That this Constitution and the laws of the United States made in pursuance thereof and treaties made under the authority of the United States shall be the supreme law of the land.'

"This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument and its adaptation to the purpose for which it was created necessarily imply."

IS COINCIDENT WITH RIGHTS OF STATES.

"Every power delegated to the Federal Government must be expounded in coincidence with a perfect right in the States to all they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation, for it is impossible to believe that these ever were, in intention or in fact, ceded to the General Government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties to be valid must be made within the scope of the same powers, for there can be no authority of the United States save what is derived mediately or immediately and regularly and legitimately from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State."

It therefore makes little difference whether the power is restricted "in subordination to the Constitution and can not supersede or interfere with any of its fundamental provisions," as Judge Story puts it; or to "the principles of the Constitution from which alone the power proceeds," as Mr. Rawle says; or we agree with Judge Duer that "those principles of the Constitution from which the power proceeds should carefully be applied to it;" or with Justice Field that the power is limited "by those restraints which are found in that instrument against the action of the Government or of its departments and those arising from the nature of the Government itself and that of the States;" for they, in substance, are all equivalent to Cooley's statement of the rule that the power "is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country or robs a department of the Government or any of the States of its constitutional authority."

Since all the authorities agree that the power must, under our form of government, be limited in some way, it necessarily follows that it can and must be limited only by the Constitution which created the power.

So we find the usual limitation in the late case of De Geofroy *v.* Riggs (133 U. S., 258) decided in 1890. The court, speaking through Mr. Justice Field, used this language:

"The treaty power as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or its departments, and those arising from the nature of the Government itself, and that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

TREATY-MAKING POWER.

In the actual exercise of the treaty-making power it has been construed to extend to the acquisition of property belonging to the citizens of each in the territory of the other: (U. S. *v.* Forty-three Gallons of Whisky, 93 U. S., 197); provisions for inheritance by aliens (Hauenstein *v.* Lynham, 100 U. S., 489; Geofroy *v.* Riggs, 133 U. S., 266; Bohaud *v.* Bize, 105 Fed., 485; People *v.* Gerke, 5 Cal., 381); the establishment of consular tribunals (In re Ross, 140 U. S., 463); to enable aliens to purchase and hold lands (Chirac *v.* Chirac, 2 Wheat., 259);

to create a judicial system (Forbes *v.* Scannell, 13 Cal., 242); the acquisition of territory by the United States (Am. Ins. Co. *v.* Canter, 1 Pet., 511; Philippine cases, 182 U. S., 197; 183 U. S., 181); the settlement of boundaries between States (U. S. *v.* Texas, 162 U. S., 38; R. I. *v.* Mass., 12 Pet., 725); the granting and accepting of awards for injuries (Frevail *v.* Bache, 14 Pet., 97; Bachman *v.* Lawson, 109 U. S., 660); and the conferring of citizenship on Indians (Cross *v.* Harrison, 16 How., 164; U. S. *v.* Rhodes, Fed. Cas. 16, 151).

I have not attempted to cite all the decisions in point, but only some of the leading cases that support the statement. It will be noticed that all of these instances are properly within the fair exercise of the power, and neither interferes with a department of the Federal Government nor robs a State—to use Judge Cooley's phrase—of its constitutional authority.

It is hardly necessary to cite authority to show that the Federal Government is one of enumerated powers, and that the States retain control of their domestic and local affairs. But if it be thought necessary, the following language of Mr. Justice Brewer, in the current number of the advance sheets of the United States Supreme Court Reports, may suffice. In referring to the effect of the thirteenth, fourteenth, and fifteenth amendments, Judge Brewer said:

"Notwithstanding the adoption of these three amendments the National Government still remains one of enumerated powers, and the tenth amendment, which reads 'the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people,' is not shorn of its vitality." (Hodges *v.* United States, 203 U. S.)

To what extent, then, may a State control its public schools in the admission or exclusion or separation of different races of pupils?

In People *v.* Gerke (5 Cal., 381), and that class of cases which permit aliens to inherit contrary to the provisions of State laws, it was contended that the treaty, in effect, nullified the State laws upon that subject. But in the Gerke case this objection was answered as follows:

"One of the arguments at the bar against the extent of this power of treaty is that it permits the Federal Government to control the internal policy of the States, and, in the present case, to alter materially the statutes of distribution. * * * I think, however, that no such consequence follows as is insisted. The statutes of distribution are not altered or affected. Alienage is the subject of the treaty. Its disability results from political reasons which arose at an early period of the history of civilization, and which the enlightened advancement of modern times and changes in the political and social condition of nations have rendered without force or consequence. The disability to succeed to property is alone removed, the character of the person is made politically to undergo a change, and then the statute of distribution is left to its full effect, unaltered and unimpaired in word or sense."

FOREIGNERS MERELY TAKE THEIR OWN.

Treaties of this kind do not confer any thing or right upon the foreigner; they merely permit foreigners to take that which is their own. But the granting to unnaturalized foreigners the right to attend the public schools of a State, either with or without charge, is something more. Does it, in Judge Cooley's language, "rob the State of its constitutional authority," and is it in the language of Justice Field, within those restrictions "arising from the nature of the Government itself and of that of the States?" Are the local public schools of a city, maintained exclusively by local taxation and presumably for the exclusive use of citizens, "properly the subject of negotiation with a foreign country?" (Geofroy *v.* Riggs, 133 U. S., 258.) The answers to these questions all turn upon the nature of our Government and the relation of the State governments to the United States Government under the Constitution.

It may be considered as fairly well settled that the establishment of separate schools for white and for colored children does not violate the constitutional right of either class to the equal privileges and immunities guaranteed by the Federal Constitution, provided equal advantages are provided for each class. (People *v.* Gallagher, 93 N. Y., 438; 45 Am. Rep., 232; Cory *v.* Carter, 48 Ind., 327; 17 Am. Rep., 738; McMillan *v.* School Committee, 107 N. C., 609; 10 L. R. A., 823; State *v.* McCann, 21 Ohio St., 198; Martin *v.* Board of Education, 42 W. Va., 514; Lehew *v.* Brummell, 103 Mo., 546; 11 L. R. A., 828; State *v.* Maryland Institute, etc., 87 Md., 643; Roberts *v.* City of Boston, 5 Cush., 198.)

Equality, and not identity, of privileges and rights is what is guaranteed to the citizen. If the right claimed be not guaranteed by the Federal Constitution, but is reserved to the States, it is difficult to see how

the Federal Government can constitutionally control it either by treaty or otherwise.

Likewise it has been repeatedly decided that State laws requiring separate coaches for white and for colored passengers on railroad trains within the State violate no privilege or immunity of either class and places no badge of slavery upon the colored passenger.

(L., N. O. & T. R. Co. *v.* Mississippi, 133 U. S., 587; Ex parte Plessy, 45 La. Ann., 80; 18 L. R. A., 639; Plessy *v.* Ferguson, 163 U. S., 537; Civil Rights cases, 109 U. S., 3; Ohio Valley R. R. Co. *v.* Lander, 104 Ky., 431.)

Cases of the class of Parrott's Chinese case (6 Sawyer, 349)—and there are many of them—are not in point and do not come up to the question. The laws of California prohibited the employment of Chinese by any corporation, and Parrott, the president of a mining company, was indicted for violating the law. Upon habeas corpus he was properly discharged, because he had a perfect right to hire a Chinaman or any other kind of a man. Moreover, the court held that the Chinaman's right to work was a property right protected by the fourteenth amendment, which extends not only to citizens, but to all persons within the jurisdiction of the United States. In Parrott's case California attempted to act under an unconstitutional law; in the school cases she is quite within her constitutional rights.

If the control of local schools can not be taken from the States and cities by a law passed by both Houses and approved by the President, because the power to do so is not granted, it would seem that the discussion is at an end, for if the power is wanting it clearly can not be done in any way, much less by the President and the Senate only.

And of this limitation of power all nations must take notice. (Taylor's International Public Law, secs. 158, 361, 364.)

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